U.S. Senate
Republican Policy
Committee

Legislative Notice

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No. 57 September 26, 2006

The Military Commissions Act of 2006 (Amendment No. 5036 to H.R. 6061)

Noteworthy

- On September 25, 2006, during consideration of H.R. 6061, the Secure Fence Act, Majority Leader Frist offered Amendment No. 5036, the text of which is the "Military Commissions Act of 2006." In addition, the Leader filed a cloture petition on that amendment.

- The Military Commissions Act is similar to S. 3930, which was introduced last week by Senators McConnell and Frist and placed on the Senate Calendar. (This Legislative Notice addresses the amendment as it was offered on the floor.)

- The cloture vote on the amendment will occur this Wednesday, September 27, unless a unanimous consent agreement to consider the Military Commissions Act as a freestanding bill is reached before then. If an agreement is not reached, and cloture on Amend. No. 5036 is invoked, there will be up to 30 hours of post-cloture debate, followed by a vote on adoption of the amendment. Please note that the Leader also filed a cloture petition on the underlying bill, H.R. 6061, the Secure Fence Act.

- In response to the Supreme Court's decision in *Hamdan v. Rumsfeld*, this amendment creates military commissions for the prosecution of war criminals and preserves the terrorist interrogation program.

- The *Hamdan* decision invalidated the military commissions that were being used to prosecute war criminals at Guantanamo Bay. This legislation authorizes the creation of military commissions to try alien unlawful enemy combatants for violations of the law of war, pursuant to a new chapter of the Uniform Code of Military Justice.

- *Hamdan* put the CIA's terrorist interrogation program in jeopardy by holding that Common Article 3 of the Geneva Convention applies to treatment of unlawful enemy combatants. President George W. Bush stated that his "single test" for this legislation would be whether that program could continue. The President has stated that this legislation serves that purpose.

Background

In the June 2006 case of *Hamdan v. Rumsfeld*, the U.S. Supreme Court invalidated military commissions established by the President to prosecute detained enemy combatants for their commission of war crimes. The Court also held that Common Article 3 of the Geneva Conventions applied to U.S. treatment of enemy combatants. Now, Congress has undertaken the responsibility of creating military commissions that comport with domestic and international law so that prosecutions of war criminals may continue, and to ensure that the arguably vague international standards embodied in Common Article 3 do not hinder the terrorist interrogations that have been so helpful in preventing future attacks.

On September 22, 2006, Senators Bill Frist and Mitch McConnell introduced S. 3930 to address these challenges, which embodies a compromise reached by the Administration and members of the Senate Armed Services Committee ("SASC"). [Note: On September 19, the Republican Policy Committee released a paper discussing key issues entitled, "Responding to *Hamdan*: Crafting Legislation to Prosecute Terrorist War Criminals and Preserve Valuable Interrogations." That policy paper provides valuable background and insight into the military commission issue. http://rpc.senate.gov/_files/Sep1906RespondHamdanBB.pdf.] Amendment No. 5036 is similar to S. 3930.

How the *Hamdan* Decision Made Congressional Action Essential

The *Hamdan* decision addressed two types of tools the President uses to further the War on Terror: a process for trying enemy combatants, and U.S. interrogation techniques. Congress must pass legislation that addresses the concerns raised by the Supreme Court in both of these areas.

Hamdan's *Impact on Military Commissions*

Hamdan has made it impossible to prosecute enemy combatants being held at Guantanamo Bay for war crimes, because the military commissions the President had authorized were held to be inconsistent with U.S. law. Prosecutions have come to a stand-still pending congressional action, because the government lacks an appropriate forum in which to try captured combatants, in particular terrorist leaders. The Department of Defense has estimated that approximately 40-80 detainees are expected to be charged with war crimes.[1]

It is essential that a forum for effective prosecutions exist if terrorist war criminals are to be brought to justice. It is true that, per *Hamdi*, enemy combatants can be held through the duration of hostilities, and it is generally agreed that hostilities will be lengthy. But detention at Guantanamo Bay is not a product of a search for justice, nor is it a form of punishment. Combatants are detained in order to keep them from the battlefield. The international law of armed conflict recognizes by "universal agreement and practice" that the primary purpose behind the capture and detention of enemy combatants is to prevent their return to combat, not to serve as punishment for criminal conduct.[2] While detention is appropriate for enemy fighters, only by prosecuting those leaders who have actually committed war crimes, and by sentencing them

[1] Donna Miles, *Officials study implications of Supreme Court ruling on tribunals*, Armed Forces Press Service, June 29, 2006, *available at* http://defenselink.mil/news/Jun2006/20060629_5548.html.

[2] *Hamdi*, 542 U.S. at 518.

either to punitive incarceration, or, in some cases, to death, will the U.S. ensure that justice is delivered. Merely holding them until hostilities end will not serve this goal.[3]

To illustrate this point, consider that President Bush recently announced the transfer of 14 captured terrorists in CIA custody to Guantanamo Bay. Included in the transfer was the infamous Khalid Sheik Mohammed ("KSM"), the 9/11 mastermind. While in CIA custody, KSM and other extremely dangerous terrorist operatives and leaders who possessed "unparalleled knowledge about terrorist networks and plans for new attacks"[4] were questioned extensively by professional interrogators. As a result, they revealed valuable information that helped stop terrorist attacks and save innocent American lives.[5] Now that their intelligence value has been extracted, the President has sent them to Guantanamo Bay with the expectation that Congress will create military commissions for their prosecution. It is reasonably safe to assume that the death penalty will be an option that prosecutors will consider in the case of KSM. That option will not be available, however, if KSM and the others are merely detained. As the President stated, "The families of those murdered [on 9/11] have waited patiently for justice…they should have to wait no longer."[6]

Hamdan's *Impact on Ongoing Interrogations*

The *Hamdan* decision has had another major effect: the undermining of effective interrogations of terrorist suspects. On September 6, 2006, President George W. Bush confirmed that a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the U.S. in a separate program operated by the CIA.[7] He explained that "the CIA program has been, and remains, one of the most vital tools in our war against the terrorists."[8] The President continued:

> Captured terrorists have unique knowledge about how terrorist networks operate. They have knowledge of where their operatives are deployed, and knowledge about what plots are underway… This is intelligence that cannot be found any other place. *And our security depends on getting this kind of information.*[9]

The Administration has explained that CIA interrogations have revealed a wide variety of intelligence, including initial leads; photo identifications; precise locations of where terrorists were hiding; identification of individuals that al Qaeda sought to use for Western operations, including persons sent to case targets inside the United States; identification of al Qaeda travel

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[3] Some of those detainees will be released when their intelligence value is depleted and the military determines that they no longer pose a threat to the United States, although experience shows that such determinations can be incorrect. Attorney General Gonzales recently explained that at least 15 detainees who were released from Guantanamo Bay have been recaptured or killed on the battlefield. Gonzales 3/7/06 Remarks.

[4] Bush 9/6/06 Remarks.

[5] Bush 9/6/06 Remarks; *see also* White House Fact Sheet: Bringing Terrorists to Justice, *available at* http://www.whitehouse.gov/news/releases/2006/09/20060906-2.html (hereinafter "White House Fact Sheet").

[6] Bush 9/6/06 Remarks; *see also* White House Fact Sheet.

[7] Bush 9/6/06 Remarks, ; *see also* White House Fact Sheet.

[8] Bush 9/6/06 Remarks; President Bush, Press Conference, September 15, 2006 (hereinafter "Bush 9/15/06 Press Conference"), *available at* http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html; *see also* White House Fact Sheet.

[9] Bush 9/6/06 Remarks (emphasis added).

routes and safe havens; explanations of how al Qaeda's senior leadership communicates with its operatives in Iraq; and identification of voices in recordings of intercepted calls.[10]

The Supreme Court's holding that Common Article 3 of the Geneva Convention applies to unlawful enemy combatants has made it very difficult for the CIA to proceed with interrogations. That is because Common Article 3 contains a prohibition against "outrages upon personal dignity" and "humiliating and degrading treatment."[11] This language has had a chilling effect on interrogators who rightfully fear that otherwise lawful interrogation techniques may be treated as falling under this Common Article 3 prohibition. In practice, they worry that they could be prosecuted under federal law, because the War Crimes Act, 18 U.S.C. § 2441, criminalizes conduct that violates Common Article 3 itself. Interrogators now lack clear notice as to what conduct is lawful,[12] and until Congress provides this notice, those servicemen and CIA interrogators responsible for extracting valuable, life-saving intelligence from dangerous terrorists remain subject to civil lawsuits and criminal prosecution for their past actions. Thus, they are forced to limit their interrogations, and the nation's intelligence-gathering suffers.

Summary of Provisions

Section 1.—Section 1 provides a short title as the Military Commissions Act of 2006 ("MCA"), as well as a table of contents for the Act.

Section 2. Construction of Presidential Authority to Establish Military Commissions—This section provides that the authority to establish military commissions under chapter 47A of title 10, United States Code, may not be construed to alter or limit the President's authority to establish military commissions for areas declared to be under martial law or in occupied territories.

Section 3. Military Commissions—This section establishes the structure and composition of military commissions. It provides that the purpose of establishing military commissions is to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commissions. "Unlawful enemy combatant" is a defined term meaning a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its allies.

This section provides that military commissions shall be composed of commissioned officers, requiring at least five members per commission, and a minimum of 12 members in a case in which the death penalty is sought. Military commissions will be presided over by a military judge who shall have no vote.

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[10] White House Fact Sheet.

[11] Geneva Convention Relative to the Treatment of Prisoners of War, art. 3.1.c, Aug. 12, 1949, *available at* http://www.yale.edu/lawweb/avalon/lawofwar/geneva03.htm (hereinafter "Geneva Convention").

[12] Background Briefing by a Senior Administration Official and a Senior Intelligence Official on the Transfer of CIA Detainees to the Department of Defense's Guantanamo Bay Detention Facility, Sept. 6, 2006 ("The issue with Common Article 3 is its vagueness. What we are asking for is precision from the language."), on file with the Senate Republican Policy Committee.

Moreover, this section requires the appointment of judge advocate general ("JAG") attorneys to serve as both the prosecution ("trial counsel") and defense counsel for each military commission. The MCA permits the accused to hire civilian defense counsel, provided that the civilian counsel is, among other things, a U.S. citizen who has appropriate security clearances and who has agreed to comply with all applicable regulations for counsel appearing before a military commission. It also permits an accused to represent himself in his trial before a military commission, so long as he knowingly and competently waives the assistance of counsel and conforms to all applicable rules.

This section also creates procedures governing the newly established military commissions, including provisions dictating: pre-trial procedure; trial procedure; sentencing; post-trial procedure and review of military commissions; and punitive matters.

Evidentiary Issues

The MCA provides generally that the Secretary of Defense shall follow the procedures and rules of evidence applicable in trials by general courts-martial under the UCMJ insofar as he deems practicable and consistent with chapter 47A. The provisions require, however, that the rules of evidence and procedure prescribed for trials by military commission ensure certain protections for the accused, including the following rights: to examine and respond to all evidence; to be present at all sessions of the commission, with certain limited exceptions; to receive the assistance of counsel; and to represent himself. The MCA further provides that evidence be admitted only if it is probative and excluded where it is unduly prejudicial. Other significant issues addressed by this section are discussed below.

1) Coerced Testimony

The MCA provides that no statement obtained by torture shall be admissible in a military commission. For statements in which the degree of coercion is disputed, the MCA provides different standards of admissibility, based on whether such statements were obtained before or after enactment of the Detainee Treatment Act ("DTA") on December 30, 2005.

For those statements obtained *before* enactment of the DTA, the military judge may admit the statement if he finds that it is reliable and probative, and that the interests of justice would be best served by its admission.

For those statements obtained *after* enactment of the DTA, the military judge may admit the statement if he finds that it is reliable and probative, that the interests of justice would be best served by its admission, *and* that the interrogation methods used to obtain the statement do not violate the cruel, unusual, or inhumane treatment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

2) Classified Information

The Military Commissions Act provides that classified information shall be protected and privileged from disclosure if disclosure would be detrimental to national security. To

protect classified information from disclosure, the MCA requires the military judge, upon motion by the trial counsel, to authorize: the redaction of classified information from a larger document; the substitution of a summary in place of classified evidence; or the substitution of a statement admitting relevant facts that the classified information would tend to prove.

The MCA permits the military judge, upon motion by the trial counsel, to allow for the admission of evidence while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence if the judge finds that such sources, activities, or methods are classified and that the evidence is reliable. The military judge may require, however, trial counsel to present the commission and defense an unclassified summary of those sources and methods.

3) Hearsay Evidence

The MCA makes hearsay evidence otherwise admissible under the rules governing general courts-martial admissible in trials by military commission.

Hearsay evidence *not* otherwise admissible under the rules of evidence applicable in trial by courts-martial may still be admitted before a military commission if the proponent gives advance notice to the accused his intention to offer the evidence and the particulars of the evidence, including circumstances under which the evidence was obtained. The accused may keep such evidence out of his trial if he is able to prove that it is unreliable or lacking in probative value.

Section 4. Amendments to Uniform Code of Military Justice—This section makes technical and conforming amendments to existing laws. It also amends Article 81 of the UCMJ to specify that conspiracy to commit an offense under the law of war is an offense punishable by either a court-martial or military commission.

Section 5. Treaty Obligations Not Establishing Grounds for Certain Claims—This section provides that no individual may invoke the Geneva Conventions as a source of rights against any officer, employee, member of the armed forces, or other agent of the United States for damages arising out of death, injury, or damage to property in any court of the United States, its States, or its territories.

Section 6. Implementation of Treaty Obligations—This section clarifies for U.S. personnel who are involved in detaining or questioning detainees which conduct is unlawful and would subject them to criminal penalties. It does so by amending the War Crimes Act to define actions that constitute grave breaches of Common Article 3 of the Geneva Conventions. Violations of the War Crimes Act ("WCA") carry penalties ranging from fines to life imprisonment, or even death. Moreover, the section reaffirms the DTA's prohibition against cruel, inhuman, or degrading treatment of detainees, providing that violations of the DTA also constitute violations of Common Article 3. Thus, violations of either the War Crimes Act or the DTA constitute violations of Common Article 3; grave breaches of that Article are codified in the WCA and are prosecutable under U.S. law. This section also delegates to the President the authority to interpret the Geneva Conventions beyond the grave breaches specified in the Act. The President

shall publish such interpretations in the Federal Register, and they shall be authoritative to the same extent as other administrative regulations.

Section 7. Habeas Corpus Matters—This section responds to the Supreme Court's decision in *Hamdan* by amending the judicial review provisions of the Detainee Treatment Act, which are now codified at 28 U.S.C. § 2241. It amends the DTA to provide that no court, justice, or judge shall have jurisdiction to consider an application for a writ of habeas corpus on behalf of any alien detainee who has been determined to have been properly detained as an enemy combatant. Moreover, the MCA amends the DTA to provide that, other than the review already provided by the DTA for CSRT determinations and final judgments of military commissions, no court, justice, or judge shall have jurisdiction to hear any other action against the U.S. or its agents with respect to the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was properly detained by the U.S. as an enemy combatant. This section makes clear that the limits of review provided by the DTA apply to *all* petitions and civil actions, regardless of whether they are pending or filed after the enactment of this Act.

Section 8. Revisions to Detainee Treatment Act of 2005 Relating to Protection of Certain United States Government Personnel—This section amends the DTA to *require* the United States to provide counsel and pay related costs for U.S. personnel facing civil or criminal prosecution arising from their duties with respect to the detention or interrogation of foreign terrorists. As written, the DTA makes the provision of counsel and resources discretionary.

Section 9. Review of Judgments of Military Commissions—This section amends the DTA to make clear that the review of final decisions of military commissions provided by the DTA shall be as of right. As written, the DTA only grants appeals as of right to capital cases or cases in which imprisonment of 10 years or more is imposed; all other cases are left to the discretion of the D.C. Circuit Court of Appeals. This amendment means that the D.C. Circuit review provided by the DTA shall be as of right for all final decisions of a military commission.

Section 10. Detention Covered by Review of Decisions of Combatant Status Review Tribunals of Propriety of Detention—Whereas the DTA currently applies only to individuals detained by the Department of Defense at Guantanamo Bay, this section amends that act so that the D.C. Circuit's limited review will apply to any alien who is detained by the United States, regardless of where he is held.

Possible Amendments

The Leader has indicated that negotiations regarding possible second degree amendments are ongoing. As of press time, no amendment text was available, nor was there any agreement as to the consideration of amendments.